Supreme Court, U. S.
FILED
OCT 30 1979
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1979

NO. 79-694

MRS. GRADY E. GUNTHARP, SR.,
Petitioner

vs.

PLANTERS OIL MILL,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE UNITED STATES.

MRS. GRADY E. GUNTHARP, SR., the Petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Mississippi entered in the above entitled case on May 30, 1979.

OPINIONS BELOW

There were two appeals in this case. The opinion of the Supreme Court of Mississippi in the first appeal is reported in *Guntharp v. Planters Oil Mill,* 358 So.2d 397 (Miss. 1978) and is set forth as Appendix "A (1)" for reference. The judgment of the Supreme Court of Mississippi in the

second appeal, here sought to be reviewed, is reported in *Guntharp v. Planters Oil Mill,* 372 So.2d 1274 (Miss. 1979) and is set forth as Appendix "A (2)". The order denying the petition for rehearing is set forth as Appendix "A (3)". The Appendix is separately presented to this petition.

JURISDICTION

The judgment of the Supreme Court of Mississippi was entered on May 30, 1979. A timely petition for rehearing was denied on August 1, 1979. (Appendix A, infra, page A-8). The jurisdiction of the Court is invoked under 28 U.S.C. Section 1257 (3).

QUESTIONS PRESENTED

Whether a trial court's action in summarily dismissing a claim in excess of Thirty-three Thousand ($33,000.00) Dollars against a defendant, without denial by the defendant or other pleading, without notice of hearing on the merits of the claim, without benefit of record or opportunity to present evidence in support of the claim, constitutes a denial of due process and equal protection under the Fourteenth Amendment to the Constitution of the United States.

CONSTITUTIONAL PROVISION INVOLVED

The pertinent provision of the United States Constitution, Amendment XIV, provides:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT

Litigation between these parties, Mrs. Grady E. Guntharp and Planters Oil Mill, began in 1974 in an original action wherein Planters Oil Mill brought its Bill of Complaint against Booneville Grain Company, both Mississippi corporations, alleging that Booneville Grain Company was indebted to Planters Oil Mill in the sum of One Hundred Fifty-nine Thousand Four Hundred Eight Dollars and Thirty-six ($159,408.36) Cents, that Booneville Grain Company was insolvent and requesting the Chancery Court of Tunica County, Mississippi, to liquidate Booneville Grain Company and to apply the proceeds to satisfaction of the debt.

Mrs. Grady E. Guntharp, derivatively as a minority stockholder in Booneville Grain Company, filed a cross-bill against Planters Oil Mill alleging that Planters' and Booneville's common officers and directors had committed acts of fraud against Booneville Grain Company and that, in fact, Planters owed Booneville over four hundred thousand dollars.

The case was tried before the Chancellor and, he having failed to render a decision within six (6) months after taking the case under advisement, the case was appealed to the Mississippi Supreme Court under the provisions of Section 11-1-17 Mississippi Code Annotated (1972) for decision.

The Mississippi Supreme Court, on May 3, 1978, rendered its decision, giving judgment to Planters Oil Mill against Booneville Grain Company for One Hundred Fifty-nine Thousand Four Hundred Eight Dollars and Thirty-six ($159,408.36) Cents, denying Mrs. Guntharp's cross-bill, and remanding the cause to the Chancery Court of Tunica County, Mississippi, to effect the liquidation of Booneville Grain Company and to apply the proceeds thereof to satis-

faction of the judgment given to Planters Oil Mill (Appendix A (1), *infra*, page A-1.)

On remand the Chancery Court appointed a liquidating receiver (R. 4), who sold Booneville Grain Company's assets at public sale (R. 15), and whose report of sale was confirmed by the Chancery Court (R. 11).

Thereafter, Planters Oil Mill filed its motion requesting that the court require the liquidating receiver to disburse the proceeds of the sale in satisfaction of its judgment (R. 21).

Shortly after the filing of the above-mentioned motion, Mrs. Guntharp, through counsel, and again in behalf of Booneville Grain Company, filed her petition to stay disbursement of the proceeds of the sale. The petition alleged that during the interim between filing of the original action and the Mississippi Supreme Court's decision, Planters Oil Mill had collected at least Thirty-three Thousand Two Hundred Forty-nine ($33,249.00) Dollars from Booneville Grain Company and that the judgment of the Mississippi Supreme Court should be reduced in at least this amount. The petition further alleged that it was believed that Planters Oil Mill had collected other sums from Booneville Grain Company, but, by virtue of the fact that Booneville Grain Company was in the hands of Planters Oil Mill (the corporations had common officers and directors, and Planters had purchased Booneville's assets at the receiver's sale, R. 16), Mrs. Guntharp did not have access to the corporate records and, therefore, no way to determine if such other funds had been collected by Planters Oil Mill. Therefore, an accounting was requested of Planters Oil Mill in this respect (R. 25-28).

Without giving Mrs. Guntharp or her counsel notice that her petition would be considered, without having any response of Planters Oil Mill of record, without benefit of

record or opportunity to present evidence in support of her claim, the Chancery Court denied her petition and granted Planters' motion (R. 35).

One Hundred Fifty-five Thousand ($155,000.00) Dollars of the One Hundred Sixty-one Thousand ($161,000.00) realized from the sale (R. 15) was paid to Planters Oil Mill (R. 38).

Appeal was again taken to the Mississippi Supreme Court, which, on May 30, 1979, affirmed the actions of the Chancery Court. (Appendix A (2)). A timely petition for rehearing was denied August 1, 1979. (Appendix A (3)).

THE STAGE OF THE PROCEEDINGS AT WHICH, AND THE MANNER IN WHICH, THE FEDERAL QUESTION SOUGHT TO BE REVIEWED WAS RAISED

Petitioner's assertion of deprivation of due process and equal protection in the summary denial of her petition by the Chancery Court was raised in general terms by assignment of error in the first instance, and specifically upon petition for rehearing in the second appeal.

The Mississippi Supreme Court wrote no opinion in the second appeal, but simply affirmed the action of the lower court.

REASONS FOR GRANTING THE WRIT

The decision below should be reviewed because fundamental Constitutional rights of due process and equal protection under the law have been denied this Petitioner.

As the Court can see, the sale of Booneville Grain Company's assets generated only One Hundred Sixty-one Thousand ($161,000.00) Dollars. All of these funds were appro-

priated by the lower court in payment of judgments and fees, with the result that Mrs. Guntharp's interest in the corporation, and the interests of the other stockholders, were rendered totally worthless. Had Mrs. Guntharp been afforded the opportunity to prove at least the allegation of her petition that Planters Oil Mill had already received Thirty-three Thousand Two Hundred Forty-nine ($33,249.00) Dollars in satisfaction of its judgment, Planters Oil Mill would have received only One Hundred Twenty-six Thousand One Hundred Fifty-nine Dollars and Thirty-six ($126,159.36) Cents, leaving Thirty Thousand Two Hundred Sixty-three Dollars and Ninety-six ($30,263.96) Cents to be divided among the stockholders as their interest appeared, and according to the Mississippi Supreme Court's direction in the first appeal. (Appendix A (1), page A-1.)

The action of the Chancery Court, and the Mississippi Supreme Court in affirmance, has deprived this Petitioner of property without due process and has denied her access to the courts of her State in violation of the Constitution of the State of Mississippi, Article 3, Section 24, which provides:

> "All courts shall be open; and every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law, and right and justice shall be administered without sale, denial, or delay."

The action of the Chancery Court, in dismissing the petition without a hearing on its own motion, is expressly contrary to previous decisions of the Mississippi Supreme Court. In *Yancy v. City of Oxford*, 254 Miss. 636, 181 So. 2d 912 (1966), the Mississippi Supreme Court so declared, saying:

> The Court, on its own motion, entered an order of dismissal finding in the Order, "that the questions involved in the matter are presently moot . . ."
>
> * * * * *
>
> This dismissal is in the nature of a compulsory nonsuit which is not recognized in Mississippi.
>
> 181 So.2d at 912.

So also, the Mississippi Supreme Court said, in *Winston v. Miller*, 20 Miss. 550, 12 Smedes & M. 550 (1849):

> In this country there is no such thing as a compulsory nonsuit, if the party insists that a jury shall pass upon his case. But what by the English practice would be good ground to compel a party to take a nonsuit, would in our law be good reason for a verdict against him; that is, where the parties have entered upon the trial. 12 Smedes & M. at 554.

That due process of law requires, before a person may be deprived of property, adequate notice and an opportunity to be heard, is beyond dispute. *Grannis v. Ordean*, 234 U.S. 385, 34 S.Ct. 779, 783, 58 L.Ed. 1363. Likewise,

> The dismissal of the complaint for failure to state a claim was, as has been stated, without a hearing and without an opportunity to be heard. The right of a litigant to be heard is one of the fundamental rights of due process of law. A denial of the right requires reversal. *Council of Federated Organizations v. Mize*, 339 F.2d 898, 900-901 (5th Cir. 1964).

The Constitution requires an opportunity to be heard which must be granted at a meaningful time and in a meaningful manner. *Armstrong v. Manzo*, 380 U.S. 545, 85 S.Ct. 1187 (1965). A State must afford to all individuals a meaningful opportunity to be heard if it is to fulfill the promise

of the Due Process clause. *Boddie v. Connecticut*, 401 U.S. 371, 91 S.Ct. 780 (1971).

This case presents no new or extraordinary question of Constitutional law, but the impact of the denial of one litigant's rights is nonetheless significant and repugnant to the Constitution by its simplicity. Such a denial of fundamental Constitutional rights should not go unnoticed nor unremedied, and for this very reason this is a case peculiarly appropriate for the exercise of this Court's discretionary jurisdiction.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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200 North Spring Street
Post Office Box 92
Tupelo, Mississippi 38801
Telephone: (601) 842-4112

PROOF OF SERVICE

I, Roy O. Parker, attorney for Mrs. Grady E. Guntharp, Sr., Petitioner herein, and a member of the Bar of the Supreme Court of the United States, do hereby certify that on the 29th day of October, 1979, I served copies of the above and foregoing Petition for Writ of Certiorari to the Supreme Court of Mississippi, together with appendices thereto, by mailing and depositing same in a United States Post Office or mail box, with first class postage prepaid, in a duly addressed envelope, to Honorable John W. Dulaney, Jr., P. O. Box 188, Tunica, Mississippi 38676, attorney for Planters Oil Mill, the Respondent herein.

It is further certified that all parties required to be served have been served.

This the 29th day of October, 1979.

ROY O. PARKER, Attorney for
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MRS. GRADY E. GUNTHARP, SR.,
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vs.

PLANTERS OIL MILL,
Respondent

APPENDIX

TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

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Of Counsel:

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APPENDIX A(1)

Mrs. Zora GUNTHARP and the Estate of Grady E. Guntharp, for and in Behalf of Booneville Grain Company, a Mississippi Corporation

v.

PLANTERS OIL MILLS, a Mississippi Corporation, R. B. Flowers, T. G. Flowers, Jr., Harry Flowers and Paul E. Gregory, Jr.

No. 50407.
Supreme Court of Mississippi.
May 3, 1978.
Rehearing Denied May 24, 1978.

Oil mill corporation filed bill of complaint alleging that grain corporation was insolvent and requested decree liquidating grain corporation with proceeds first to be applied to debt owed oil mill corporation, and minority stockholders of grain corporation filed cross-bill against oil mill corporation and common officers and directors of grain and oil mill corporations, seeking monetary damages for fraud and mismanagement. The Chancery Court, Tunica County, Harvey T. Ross, Chancellor, did not render final decision within six months, and appeal was taken. The Supreme Court, Bowling, J., held that: (1) minority stockholders of insolvent grain corporation could not recover against individuals who were officers of both grain corporation and oil mill corporation, on theory that cross-defendants did not deal with grain corporation in proper manner and converted funds of grain corporation to oil mill corporation, in that no fraud or mismanagement was committed by cross-defendants, and (2) oil mill corporation, which had on various occasions made loans of large sums of money without interest to grain corporation with which it did much business, would be granted its prayer that grain corporation, which had become insolvent, be liquidated as provided by law and that first application of

proceeds be to oil mill corporation in repayment of all or part of debt owed by grain corporation.

Judgments entered.

1. Corporations 318

Officers and directors of grain corporation, who were also officers and directors of oil mill corporation with which grain corporation did a large portion of its business, were in fiduciary relationship with grain corporation and had duty of dealing fairly and with utmost caution in regard to business of grain corporation.

2. Corporations 318

Minority stockholders of insolvent grain corporation could not recover, on cross-bill of complaint filed in action by oil mill corporation alleging that grain corporation was insolvent and requesting liquidation with proceeds first to be applied to debt owed by grain corporation to oil mill corporation, against individuals who were officers of both grain corporation and oil mill corporation, on theory that cross-action defendants were in fiduciary relationship and did not deal with grain corporation in proper manner and converted funds of grain corporation to oil mill corporation, in that no fraud or mismanagement was committed by cross-defendants.

3. Corporations 615, 627

Oil mill corporation, which had on various occasions made loans of large sums of money without interest to grain corporation with which it did much business and with which it shared common officers and directors, would be granted its prayer that grain corporation, which had become insolvent, be liquidated as provided by law and that first application of proceeds of liquidation be to oil mill corporation in repayment of all or part of debt owed by grain corporation to oil mill corporation.

Parker, Averill & Butts, David O. Butts, Jr., Tupelo, for appellants.

Dulaney & Dulaney, J. W. Dulaney, Jr., Tunica, for appellees.

Before ROBERTSON, LEE and BOWLING, JJ.

BOWLING, Justice, for the Court:

This appeal is under the provisions of Mississippi Code Annotated Section 11-1-17 (1972), providing that any party to litigation in the lower court may appeal if the lower court has not rendered a final decision within six months from the date the cause was taken under advisement or the final due date of the briefs. Appellants perfected their appeal under this statute, and, as required, the appeal is the same as if a final decree had been rendered adversely to them.

The appeal is from the Chancery Court of Tunica County. Planters Oil Mill, one of the appellees, filed its bill of complaint against Booneville Grain Company, Charles Crabb as executor of Grady E. Guntharp, Mrs. Grady E. Guntharp, Sr., Grady E. Guntharp, Jr., R. B. Flowers, T. G. Flowers, Jr., Harry Flowers and Paul E. Gregory, Jr. The bill of complaint alleged that the Booneville Grain Company was insolvent and requested a decree of the court liquidating that corporation with proceeds first to be applied to a debt owed complainant in the sum of $159,408,36.

Mrs. Zora Guntharp, Grady E. Guntharp, Jr., individually, and as successor executor of the estate of his father, Grady E. Guntharp, Sr., deceased, filed their answer and cross-bill against the complainant, Planters Oil Mill, and R. B. Flowers, T. G. Flowers, Jr., Harry Flowers and Paul E. Gregory, Jr. The cross-bill was essentially a derivative stockholders action on behalf of Booneville Grain Company and its minority stockholders alleging that cross-defendants had committed fraudulent acts against the corporate structure of Booneville Grain Company; that the cross-defendants failed to handle the business of the Booneville Grain Company to the best

interest of that corporation; that the individual cross-defendants were officers of both complainant and defendant corporations and thereby were in a fiduciary relationship and did not deal with the Booneville Grain Company in a proper manner and converted funds of Booneville Grain Company to Planters Oil Mill. The cross-bill of complaint requested judgment for the above alleged actions in the sum of $406,382.13.

The answer of the original defendants denied that the complainant was entitled to any relief, including liquidation of the corporation. During the oral arguments, however, the solicitor for defendants and cross-complainants joined in the request to liquidate the corporation but retained the prayer for monetary damages.

The history of Booneville Grain Company is quite interesting. The corporation was organized and the business started in 1966, at which time the shares of stock were divided equally between the Flowers group of Tunica and the Guntharp group composed of Grady E. Guntharp, Grady E. Guntharp, Jr., and Daisey Blanchard, Mr. Guntharp's daughter. Each of the six persons received fifty shares. Guntharp became president and acted in that capacity and in the management of the company until his death in 1970. The three Flowers brothers paid the corporation $5,000 each for their shares. R. B. Flowers then loaned the Guntharp group $15,000 to buy their shares. This loan was never repaid. From its inception, Booneville Grain Company went down a rocky road and has never been solvent. The complainant and cross-defendant, Planters Oil Mill, on various occasions, loaned Booneville Grain Company large sums of money without interest. These loans were secured from the Booneville branch of the Peoples Bank & Trust Company of Tupelo, Mississippi. Marion Smith was branch manager. None of these loans were made to Booneville Grain Company without the personal endorsement of R. B. Flowers; otherwise, the loans would not have been made.

The record is clear that on numerous occasions Grady E. Guntharp committed acts of gross mismanagement and wrongful acts in regard to Booneville Grain Company. Some of these acts amounted to embezzlement. He appropriated large sums of money to his own use; he wrote company checks to his wife and son; he speculated in the cotton market with the funds of the corporation, and lost large sums of money in this manner that were illegally withdrawn from company funds. These actions of wrongdoing on the part of Guntharp persisted until his death, at which time it appeared that the corporation was hopelessly insolvent.

Shortly before Mr. Guntharp's death, ten shares of stock in the corporation were transferred to Marion Smith, the banker. According to appellants, this was for the purpose of Smith consenting to act as executor of Guntharp's estate upon his death. According to Smith, this was done out of gratitude for assistance he gave the corporation. After Mr. Guntharp's death, Smith transferred these ten shares to R. B. Flowers, who in turn transferred them to Paul E. Gregory, Jr., one of the cross-defendants below.

The corporate structure was reorganized after Guntharp's death and R. B. Flowers became secretary-treasurer and gained control of the corporate operations and continued in that capacity until this suit was filed in November, 1974. The Booneville Grain Company continued operations of purchasing soybeans and immediately reselling them, which was the sole business carried on by the company. Appellants contend that during this period of time R. B. Flowers, for himself and the other appellees, entered into a course of business dealings with the soybean sales that resulted in decreased profits to Booneville Grain Company and increased profits to Planters Oil Mill. We will not go into these transactions in detail. It suffices to say that through the efforts of R. B. Flowers, Booneville Grain Company stayed in business although heavily in debt. A guaranteed percentage of profit was allocated to Booneville by Planters,

although a large portion of the beans bought by Booneville Grain Company was sold through Planters. A margin of profit was allocated to Booneville that was greater than other grain elevators were receiving in the Booneville community.

[1, 2] No citation of authority is needed to recognize that R. B. Flowers and his two appellee brothers were in a fiduciary relationship with Booneville Grain Company. They were officers and directors of both corporations. Also no citation of authority is needed to recognize that in this capacity they had the duty of dealing fairly and with the utmost caution in regard to the business of Booneville Grain Company. This we find they did. There is no adequate proof in the record to make any finding that R. B. Flowers or the other appellees were guilty of fraud, mismanagement, waste, or any other act to be detriment of Booneville Grain Company. If it had not been for Flowers, Booneville would have been out of existence upon the death of Guntharp. Through the efforts of Flowers, the debts owed by Booneville were reduced so that at the time this cause was filed Booneville only owed Planters approximately $160,000, whereas upon the death of Guntharp, several times that figure was owed to Planters. Of course, this Court recognizes that the soybean buying and selling activities through Booneville after Guntharp's death were carried on to secure the best tax benefits possible for all parties. This, however, certainly does not constitute fraud.

Appellants contend that the ten shares of Booneville Grain Company stock given Smith and then transferred to Flowers should be returned to the Guntharp group because of fraud. We find no justification whatever in this contention. At the time of the transfer from Smith to Flowers, these shares certainly were worthless.

The Court finds that there was no fraud or mismanagement committed by appellees in operating Booneville Grain Company from the time of Guntharp's death until this litigation began. The proof is opposite to this contention. The actions of appellees kept Booneville operating until it final demise. At the time the suit was filed the company's facilities were being rented to another company. We hold that there are no grounds for recovery by appellees under their cross-bill of complaint and it is dismissed.

[3] We further find and hold that the prayer of the original bill of complaint be granted and that Booneville Grain Company be liquidated as provided by law; that out of the proceeds of such liquidation the first application of funds shall be to Planters Oil Mill in repayment in the sum of $159,408.36, and Planters is given judgment against Booneville Grain Company in the sum of $159,408.36.

If, after that distribution, any funds remain, they shall be distributed according to the records of the corporation regarding other debts and the holders of corporate stock.

The cause is remanded to the Chancery Court of Tunica County for the purpose of carrying out the mandate of this Court and the legal proceedings to effect the liquidation of Booneville Grain Company in accordance with this opinion.

JUDGMENT HERE FOR APPELLEE, PLANTERS OIL MILL ON ORIGINAL BILL OF COMPLAINT, AND JUDGMENT HERE FOR APPELLEES ON CROSS-BILL OF COMPLAINT, AND REMANDED.

PATTERSON, C. J., SMITH, P. J., ROBERTSON, P. J., and SUGG, WALKER, BROOM, LEE and COFER, JJ., concur.

APPENDIX A(2)

Mrs. Grady E. GUNTHARP, Sr.

v.

PLANTERS OIL MILL.

No. 51271.

Supreme Court of Mississippi.

May 30, 1979.

Rehearing Denied Aug. 1, 1979.

Appeal from Chancery Court, Tunica County; Harvey T. Ross, Chancellor.

Parker, Averill & Butts, Roy O. Parker, David O. Butts, Jr., Tupelo, for appellant.

Dulaney & Dulaney, J. W. Dulaney, Jr., Tunica, for appellee.

Before SUGG, BROOM and COFER, JJ.

AFFIRMED.

APPENDIX A(3)

WEDNESDAY, AUGUST 1, 1979, COURT SITTING:

MRS. GRADY E. GUNTHARP, SR.

#51,271 v

PLANTERS OIL MILL

This cause this day came on to be heard on Petition for Rehearing and this Court having sufficiently examined and considered the same en banc and being of the opinion that the same should be denied doth order that said Petition be and the same is hereby denied.

ATTEST

A True Copy

This the 24th day of Oct. 1979

JULIA H. KENDRICK, CLERK
SUPREME COURT OF MISSISSIPPI

By: Debbie Holmes

Supreme Court, U. S.
FILED
NOV 27 1979
MICHAEL RODAK, JR., CLERK

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OCTOBER TERM, 1979

No. 79-694

MRS. GRADY E. GUNTHARP, SR.,
Petitioner,

vs.

PLANTERS OIL MILL,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

No constitutional question, if one ever existed, can now be raised since Petitioner failed to assert her alleged rights in the Supreme Court of Mississippi on the first appeal. (Cause No. 50,407, *Mrs. Zora Guntharp, et al. v. Planters Oil Mill, et al.*, 358 So. 2d 397, May 3, 1978, Rehearing denied May 24, 1978). The Court on that appeal awarded Respondent a judgment for exactly $159,408.36 based on an open account, the amount, validity and credits on which account were at issue. The Court then remanded the case with instructions to the lower Court to liquidate insolvent Booneville Grain Company and apply the proceeds of liquidation to that $159,408.36 judgment. Petitioner made no objection whatsoever to this procedure or the amount of judgment or that alleged credits should be applied to that judgment and asked for no clarification or correction of the judgment or the opinion of the Court.

The Petitioner had ample opportunity with her petition for rehearing in the Supreme Court of Mississippi on this first appeal to complain and express her dissatisfaction, if any, as to the amount of the judgment or procedure on remand. She did not do this. While Petitioner did file a petition for rehearing she did not complain that the Court had erred in the amount of the judgment awarded or suggest that it should be adjusted upon remand. Her petition for rehearing in no way requested the Court to require an accounting upon remand of the case and therefore, upon remand, the Chancery Court did exactly what it was instructed to do by the Supreme Court of Mississippi. It liquidated Booneville Grain and applied the proceeds of liquidation to the judgment. It did not require an accounting. It was not told by the Supreme Court to do so.

We have included in the appendix to this reply a complete copy of the petition for rehearing on the first appeal to the Supreme Court of Mississippi which shows the absence of any suggestion by Petitioner that the Court had erred in the amount of judgment awarded or that an accounting should be required upon remand. Petitioner also filed a maximum-length brief in support of this petition for rehearing. This brief neither states nor intimates any dissatisfaction with the amount of the judgment nor does it ask for accounting when the case was remanded. This was the time and the only time for Petitioner to complain and she made no complaint in this regard.

Petitioner claims in her Petition for Certiorari that she was unconstitutionally denied the right to be heard. Her right to be heard was before the Supreme Court of Mississippi on the first appeal and in her petition for rehearing on that appeal. The same alleged credit to which Petitioner refers in her Petition for Certiorari was involved in the first appeal to the Supreme Court of Mississippi. The alleged credit of $33,249.00 was not allowed by the Supreme Court in awarding judgment and the Petitioner made no complaint about this in her petition for rehearing. Had she done so, Respondent could and would have claimed four years of prejudgment interest of over $44,000.00 to which it was entitled; but, since Petitioner did not complain of the amount of the judgment, neither did Respondent, and the judgment became final and neither party thereafter could go behind that judgment as Petitioner sought to do after remand and on her second appeal to the Supreme Court of Mississippi and now seeks to do by this Petition for Certiorari.

It was so obvious that the Petitioner had failed to make timely objection during the first appeal and in her petition for rehearing following that decision, the Supreme Court of Mississippi on the second appeal en banc found that there was no merit in Petitioner's claim that the amount of the judgment was in error or that she could, at that late date, demand an accounting since she had not done so in the previous appeal. (Cause No. 51,271. *Mrs. Grady E. Guntharp, Sr. v. Planters Oil Mill*, 372 So. 2d 1274, May 30, 1979, rehearing denied August 1, 1979).

No constitutional issue is involved. It is simply a case where the Petitioner failed to register her complaint at the proper time in the Supreme Court of Mississippi. We therefore, submit that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Of Counsel:
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Tunica, Mississippi 38676

PROOF OF SERVICE

I, John W. Dulaney, Jr., attorney for Planters Oil Mill, Respondent herein, and a member of the Bar of the Supreme Court of the United States, do hereby certify that on the 26th day of November, 1979, I served copies of the above and foregoing Brief in Opposition to Petition for Writ of Certiorari by mailing and depositing same in a United States Post Office or mailbox, with first class postage prepaid, in a duly addressed envelope, to Honorable Roy O. Parker, P.O. Box 92, Tupelo, Mississippi 38801, attorney for Mrs. Grady E. Guntharp, Sr., the Petitioner herein.

It is further certified that all parties required to be served have been served.

This the 26th day of November, 1979.

JOHN W. DULANEY, JR.
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Tunica, Mississippi 38676
Telephone: (601) 363-2922
Attorney for Planters Oil Mill, Respondent

IN THE SUPREME COURT OF MISSISSIPPI
CAUSE NO. 50,407

MRS. ZORA GUNTHARP AND THE ESTATE OF GRADY E. GUNTHARP, FOR AND IN BEHALF OF BOONEVILLE GRAIN COMPANY, A MISSISSIPPI CORPORATION
APPELLANTS

v.

PLANTERS OIL MILL, A MISSISSIPPI CORPORATION, R. B. FLOWERS, T. G. FLOWERS, JR., HARRY FLOWERS, AND PAUL E. GREGORY, JR.
APPELLEES

PETITION FOR REHEARING

Come now the Appellants, through counsel, and petition this Honorable Court for a rehearing of this cause, and in support hereof would respectfully show the following:

1.

This Honorable Court, under the exceptional circumstances of considering this cause without opinion of the lower court, rendered its opinion on May 3, 1978, granting the relief prayed for by Appellee Planters Oil Mill in its original bill of complaint and denying the relief sought by Appellants in their cross-bill. This cause was remanded to the Chancery Court of Tunica County to effect the liquidation of Booneville Grain Company.

2.

The record of this cause presented to the Court the following undisputed facts:

a. That R. B. Flowers, T. G. Flowers and Harry Flowers are directors, officers and majority stockholders in both Planters Oil Mill and Booneville Grain Company.

b. That during Booneville's fiscal year 1974 Planters Oil Mill, without right by contract or otherwise, appropriated to its own use $365,291.74 realized from the sale of Booneville's soybeans;

c. That R. B. Flowers, as president of Planters and secretary-treasurer of Booneville, directed the appropriation of this money.

Appellants most respectfully suggest that the Court erred in finding that no fraud, mismanagement, waste, or any other act to the detriment of Booneville Grain Company was committed by Appellees.

Respectfully submitted,

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